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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.570 OF 2004

Attahurrehman Samjuddin Shaikh ... Appellant

V/s.

State of Maharashtra ... Respondent

Mr.Khan Abdul Waheb for Appellant
Dr.F.R. Shaikh, APP, for Respondent

CORAM: **D.G. DESHPANDE &**
SMT.NISHITA MHATRE, JJ.

DATED: **APRIL 16, 2007**

ORAL JUDGMENT:

. The Appeal is directed against the judgment and order of the Additional Sessions Judge, Greater Bombay dated 17.4.2004. The Sessions Court has convicted accused No.1 i.e., the appellant herein under section 302 r/w 34 of the Indian Penal Code and sentenced him to suffer imprisonment for life. The appellant-accused No.1 has also been directed to pay a fine of Rs.10000/-. Accused Nos.2, 3 and 4 are absconding and, therefore, the trial was conducted only against accused No.1.

2. The prosecution story is that the victim, who was a 70 year old woman, was residing with her daughter Pari in a bungalow known as Pink bungalow. Some construction work was undertaken in the compound of this bungalow and was in progress for about 20 - 22 days prior to the incident. About 3 or 4 workers were

engaged for the job. On 18.6.2001, the complainant, who resided in a building adjacent to the Pink Bungalow, was sitting in his STD booth at about 10.30 am when Pari informed him that her mother had fallen down and had sustained bleeding injuries. Pari was well acquainted with the complainant as she often played with his daughter. The complainant first went to Dr.Modi who was practising in the vicinity and requested him to accompany him to the Pink bungalow. The victim was found lying in a pool of blood near the entrance of her bedroom. Both her legs were tied with rope. Her mouth and neck were also tied with clothes. The Doctor accompanying the complainant declared that the victim was dead. The complainant then lodged a complaint which was treated as an FIR with the police station. A case was registered under section 302 of the Indian Penal Code against unknown persons. The spot cum inquest panchanama of the place of offence at Pink bungalow was drawn. The police officer who drew up this Panchanama also seized two blood stained towels, a rope and hair. The blood stained clothes of the deceased were also taken charge of. It appears that investigations proceeded for more than a year. Statements of various witnesses were recorded by the police including that of Pari. The accused was arrested on 3.8.2002. The prosecution has alleged that on interrogating him, the appellant disclosed the names of three other persons who are the accused in this case. Recovery of a Rampuri

knife at the instance of the accused has been noted in the disclosure Panchanama on 7.8.2002. A Test Identification Parade was held on 23.8.2002. The appellant was identified by the witnesses. The appellant was charged with having committed an offence punishable under section 302 of the Indian Penal Code. The trial was committed to Sessions. The Sessions Court has convicted and sentenced the appellant as aforesaid.

3. Ten witnesses have been examined by the prosecution in support of its case that the appellant had committed a culpable homicide. PW9 is the child witness Pari, the daughter of the deceased. A perusal of the evidence of this witness does not inspire any confidence. There are many contradictions in her testimony. She has admitted in her evidence that she had not seen the actual incident in which the victim was killed. She claims in her testimony that she had attended the Test Identification Parade and had identified one person by the name Aslam (not the applicant's name). She pointed out to the appellant in Court as the person whom she had identified at the Parade. The witness then claimed that the appellant had demanded the keys from the victim which the victim had refused to part with. She has admitted that the keys which were demanded by the appellant were those of the garage situated in the compound of Pink bungalow. She has also admitted in her cross-examination that the

repair work had been completed about 4 to 5 days prior to the incident after which the appellant had stopped attending duty at the bungalow. Thus, this witness is not an eye witness to the incident.

4. The prosecution has relied on the discovery of a Rampuri knife at the instance of the appellant. This discovery was made on 7.8.2002, more than a year after the incident. The recovery panchanama does not disclose that the knife was blood stained.

5. The next piece of evidence which the prosecution has relied on is that the appellant had been identified by Pari, one Keshulal who had undertaken the contract of repairing the Pink bungalow and had employed the appellant, one Kanojia and Desai. Kanojia and Desai have been examined as PW3 and PW1 respectively. Significantly, Keshulal has not been examined although he identified the appellant as claimed by the prosecution. There is nothing in the testimony of PW1 to indicate that he knew the appellant earlier or that he had seen the appellant working in the Pink bungalow. Kanojia who is PW3 is a washerman and knew the victim. He has spoken about the masonry work which was carried out in the Pink bungalow. He learnt of the victim’s death when he noticed a crowd in front of the bungalow. This witness has stated categorically that he did not identify anybody at the Test Identification Parade held

on 23.8.2002. He has been declared hostile and, therefore, his evidence is of no use to the prosecution. PW4 who was one of the workers employed by Keshulal at the Pink bungalow was not asked to identify the appellant at the Test Identification Parade although his statement was recorded by the police on 19.6.2001. However, Keshulal who allegedly identified the appellant at the Test Identification Parade has not been examined by the prosecution before the court.

6. Therefore, the circumstances relied on by the prosecution to prove its case against the appellant are: (i) that the appellant had been engaged alongwith other workers to carry out masonry work in the Pink bungalow. (ii) that the victim’s daughter and three others had identified the appellant at the Test Identification Parade; and (iii) that a Rampuri knife was recovered at the instance of the appellant

7. The prosecution has been able to prove that the appellant had been working in the premises of the Pink bungalow. He had been engaged as a contract worker by one Keshulal. However, there is evidence on record to indicate that the work had been completed about 4 - 5 days prior to the incident. In fact PW9 has stated that the appellant had stopped attending work at the Pink Bungalow about 4 - 5 days before the incident.

8. As aforesaid, although the prosecution claims that the daughter of the victim has identified the appellant at the Test Identification Parade, in her testimony she has stated that she identified the appellant as one Aslam. However, this is not the name that he is known by. This child witness had not seen the incident. PW1, the complainant learnt of the incident when PW9 reported to him that her mother was injured and bleeding after which an FIR was lodged by him. The child witness has spoken about the quarrel between her mother and the appellant and some co-workers regarding the keys of the house. The Investigating Officer has denied that the witness disclosed this fact when her statement was recorded immediately after the incident. The possibility of her being tutored thereafter cannot be ruled out.

9. The identification of the appellant by the 3 or 4 other persons besides the victim’s daughter at the Test Identification Parade is also of no consequence. PW1 who has identified the appellant has not stated in his deposition as to how he knew the appellant or that he had seen the appellant working at the Pink bungalow. PW3, another person, who the prosecution claims has identified the appellant has denied this fact in his testimony, after which he was declared as a hostile witness. Keshulal, the contractor who had undertaken the repair work of the bungalow and who had engaged the

appellant and other workers had also identified the appellant at the Test Identification parade. However, he has not been examined before the Court. There is no explanation as to why the prosecution held back this witness except that the investigating officer had stated in his testimony that Keshulal was not traceable. The Investigating Officer in fact has stated in his cross-examination that the investigations revealed that this Keshulal was working as a civil contractor as well as a real estate broker. He had approached the victim for the sale of her bungalow for a sum of Rs.3.5 crores. Despite this, the prosecution has not cared to examined this vital witness for reasons best known to it.

10. As stated earlier, there are no blood stains on the Rampuri knife. The disclosure made after more than a year is thus suspect. The Investigating Officer had not signed the Panchanama after it was drawn up but had appended his signature much later as admitted by him in his testimony before the court. There is no evidence on record which indicates that the Rampuri knife bore the finger prints of the appellant. Therefore, this circumstance relied on by the prosecution does not advance the case of the prosecution.

11. In our opinion, the circumstances relied on by the prosecution do not form a chain which points to the only hypothesis, that the appellant is guilty of the

offence with which he is charged. In fact the investigation in this case has been carried out in a slipshod manner. It is difficult to believe that any of the witnesses have identified the appellant who was a casual worker, at a Test Identification Parade held more than one year after the incident. The recovery of the knife is also doubtful especially since there were no blood stains on it and the investigating officer has not thought it fit to analyse the finger prints, if any, on the knife. In such circumstances, in our opinion, there is no evidence at all on record which points to the guilt of the appellant. The prosecution has miserably failed to prove its case against the appellant. Hence, the appeal must be allowed.

12. Appeal allowed. The judgment and order of the Additional Sessions Judge, Greater Bombay dated 17.4.2004 is set aside. The conviction and sentence of the accused under section 302 r/w 34 of the Indian Penal Code is set aside. The accused be immediately set free, if not otherwise required in any other case.

(D.G. DESHPANDE, J.)

(SMT.NISHITA MHATRE, J.)